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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 THOMAS J. WEST, III, )

8 Plaintiff, )

9 v. )

10 JO ANNE B. BARNHART, )  
Commissioner of Social Security, )

11 Defendant. )  
12 )

CASE NO. C05-1711-RSL-MJB

REPORT AND  
RECOMMENDATION

13 Plaintiff Thomas J. West, III appeals to the District Court from a final decision of the  
14 Commissioner of the Social Security Administration (the “Commissioner”) denying his  
15 application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security  
16 Act. For the reasons set forth below, it is recommended that the Commissioner’s decision be  
17 REVERSED and REMANDED for payment of benefits..

18 I. PROCEDURAL HISTORY

19 Plaintiff filed an application for SSI in October of 2000 (Tr. 56-62), claiming he was  
20 disabled beginning January 1, 1995, due to chronic hepatitis, asthma, fatigue, edema, and pain in  
21 his lower back and abdomen. (Tr. 60, 80, 116). Plaintiff subsequently amended his disability  
22 onset date to October 16, 2000, because he is ineligible for SSI benefits up to and including  
23 October of 2000. *See* 20 C.F.R. §§ 416.330, 416.335. Plaintiff’s application was denied initially  
24 (Tr. 26-29) and on reconsideration (Tr. 32-34), after which he requested a hearing with an

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1 Administrative Law Judge (ALJ). Plaintiff testified and was represented by counsel at a July 9,  
2 2002 hearing before ALJ Batisse. (Tr. 442-489). Vocational expert (“VE”) Paul Tomita also  
3 testified. (Tr. 476-88). The ALJ issued his decision finding Plaintiff not disabled on September  
4 11, 2002. (Tr. 13-23). The Appeals Council declined to review the ALJ’s decision on March 8,  
5 2004 (Tr. 7-9), and Plaintiff filed a complaint for judicial review with this court on March 17,  
6 2004. (C04-0569-JLR). This Court remanded the case for a de novo hearing on September 16,  
7 2004, instructing the ALJ to re-evaluate medical evidence, Plaintiff’s credibility and residual  
8 functioning capacity (“RFC”), and all new evidence, and to obtain additional VE testimony. (Tr.  
9 514-16). The Appeals Council remanded the case consistent with this Court’s order (Tr. 517-  
10 21), and instructed that Plaintiff’s October 2000 SSI application be consolidated with a second  
11 application he filed in October of 2002 (Tr. 521, 574-76).

12 On July 13, 2005, Plaintiff had a second hearing before ALJ Batisse, which included  
13 testimony from Plaintiff, a medical expert (ME), and a VE. (Tr. 1027-77). ALJ Batisse again  
14 found Plaintiff not disabled and denied benefits for a second time on August 30, 2005. (Tr. 490-  
15 513). Plaintiff did not file exceptions and the Appeals Council did not assume jurisdiction of the  
16 case, making the August 2005 decision the final decision in the case. 20 C.F.R. § 416.1484(d).  
17 Plaintiff filed a complaint for judicial review with this Court on October 12, 2005.

## 18 II. THE PARTIES’ POSITIONS

19 Plaintiff requests that the Court reverse the ALJ’s finding that Plaintiff is not disabled and  
20 order payment of benefits outright or remand for further proceedings. Plaintiff argues that the  
21 ALJ erroneously found Plaintiff not credible, improperly rejected medical opinion evidence and  
22 lay testimony, made an inadequate severity finding as to several impairments, and erred in finding  
23 Plaintiff not disabled by relying on the Medical-Vocational Guidelines (“the grids”).

24 The Commissioner argues that the ALJ applied correct legal standards and cited



1 substantial evidence, and his finding that Plaintiff is not disabled should therefore be affirmed.

### 2 III. STANDARD OF REVIEW

3 The court may set aside the Commissioner's denial of social security disability benefits  
4 when the ALJ's findings are based on legal error or not supported by substantial evidence in the  
5 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is  
6 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence  
7 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,  
8 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving  
9 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
10 1039 (9th Cir. 1995). Rather than affirming the Commissioner's decision by isolating a specific  
11 quantum of supporting evidence, the Court must consider the record as a whole and weigh  
12 evidence that supports and evidence that detracts from the Secretary's conclusion. *Tackett v.*  
13 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Where the evidence is susceptible to more than one  
14 rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v.*  
15 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

### 16 IV. EVALUATING DISABILITY

17 The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d  
18 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial  
19 gainful activity by reason of any medically determinable physical or mental impairment, which  
20 can be expected to result in death, or which has lasted or can be expected to last for a continuous  
21 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

22 The Social Security regulations set out a five-step sequential evaluation process for  
23 determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20  
24 C.F.R. § 416.920. At step one, the claimant must establish that he or she is not engaging in any

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1 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant  
2 must establish that he or she has one or more medically severe impairments or combination of  
3 impairments. If the claimant does not have a “severe” impairment, he or she is not disabled. *Id.*  
4 at § ©). At step three, the Commissioner will determine whether the claimant’s impairment  
5 meets or equals any of the listed impairments described in the regulations. A claimant who meets  
6 one of the listings is disabled. *See Id.* at § (d).

7 At step four, if the claimant’s impairment neither meets nor equals one of the impairments  
8 listed in the regulations, the Commissioner evaluates the claimant’s residual functional capacity  
9 and the physical and mental demands of the claimant’s past relevant work. *Id.* at § (e). If the  
10 claimant is not able to perform his or her past relevant work, the burden shifts to the  
11 Commissioner at step five to show that the claimant can perform some other work that exists in  
12 significant numbers in the national economy, taking into consideration the claimant’s residual  
13 functional capacity, age, education, and work experience. *Id.* at § (f); *Tackett*, 180 F.3d at 1100.  
14 If the Commissioner finds the claimant is unable to perform other work, then the claimant is  
15 disabled.

## 16 V. SUMMARY OF THE RECORD EVIDENCE

17 Because the parties have adequately summarized the record in their briefing, and because  
18 much of the record evidence is not relevant given the scope of the issues, the Court will not  
19 summarize the record here. Relevant evidence will be referenced in the discussion as necessary.

20 Born February 26, 1957 (Tr. 60), Plaintiff was 43 years old when he filed his SSI  
21 application and 48 years old when the ALJ issued his August 2005 decision. Plaintiff is a high  
22 school graduate with past relevant work as a hardwood floor finisher. (Tr. 448, 1067).

## 23 VI. THE ALJ’S DECISION

24 At step one, the ALJ found the Plaintiff was not engaged in substantial gainful activity



(Tr. 494, 512, Finding no. 1). At step two, the ALJ found Plaintiff's liver-disease-related edema, seizure disorder, asthma, and depression were severe impairments. (Tr. 506, 512, Finding no. 2). The ALJ did not find that Plaintiff's restless leg syndrome, sleep apnea, limb movement during sleep, or anxiety were severe. At step three, the ALJ found that Plaintiff's impairments did not meet or equal a listed impairment. (Tr. 506, 512, Finding no. 3). The ALJ determined that Plaintiff's RFC allowed him to perform light, unskilled work without frequent interaction with the public. (Tr. 510, Findings 5 and 10). At step four, the ALJ determined that Plaintiff could not perform his past relevant work as a floor refinisher. (Tr. 510, 512, Finding no. 6). At step five, the ALJ found Plaintiff not disabled by using the grids, Rule 202.20 or 202.21. (Tr. 511, Finding 11).

## VII. DISCUSSION

### A. Plaintiff's Credibility

Plaintiff argues that in assessing his credibility the ALJ failed to state specific, clear and convincing reasons for rejecting Plaintiff's testimony. The Commissioner responds that the ALJ's assessment must be upheld as a rational interpretation of the evidence.

The ALJ's reasons for rejecting a claimant's testimony must be clear and convincing, and supported by specific findings stating which testimony is not credible and what evidence suggests that conclusion; general findings are insufficient. *Smolen v. Chater*, 80 F.3d 1273, 1282-84 (9th Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). In this case, the ALJ articulated several reasons for finding Plaintiff not credible, but careful review of the record reveals that these reasons do not provide a "convincing" basis for the ALJ's finding.

First, the ALJ found Plaintiff inconsistent because he claimed to need twelve or more hours of sleep each day but also reported difficulty sleeping. (Tr. 507). However, Plaintiff's claim that he requires excessive sleep does not exclude the possibility that he also has also



1 difficulty sleeping. Although Plaintiff experienced trouble sleeping due to anxiety (Tr. 382) and  
2 violent body-jerking (Tr. 380), his chronic fatigue and need for sleep are well-documented in the  
3 record (Tr. 116-18, 129, 457, 470, 590, 604, 624, 628, 630, 918, 949, 981, 1053-54, 1057).

4 Second, the record does not support the medical non-compliance which the ALJ found  
5 undermined Plaintiff's credibility. *See* 20 C.F.R. § 416.930; *Fair v. Bowen*, 885 F.2d 597, 603  
6 (9th Cir. 1989). Instead, the record supports Plaintiff's argument that he engaged with his  
7 treatment providers and tried to follow their directions. (Tr. 725, 863, 922, 949, 951, 1018, 717,  
8 876-79, 956, 910, 913-14). It is true that Plaintiff did not take anti-depressants for 6 months,  
9 but according to his treatment provider this was due to its side effects, and Plaintiff tried other  
10 drugs which he found helpful. (Tr. 371). Plaintiff also did not take Serzone for fear of side  
11 effects, but later agreed to try it after discussing it with his doctor. (Tr. 405).

12 Third, the ALJ found that Plaintiff's activities conflicted with his claims of fatigue and  
13 swelling in his hands, feet, and abdomen (Tr. 507, 449-50, 473), and that medications Plaintiff  
14 was taking alleviated his anxiety and asthma (Tr. 462, 466). The Commissioner argues this  
15 enabled him to drive to the methadone clinic, do chores, put together model cars, play guitar, and  
16 shop. (Tr. 451-52, 457-58, 857, 860, 865). However, medical records and corroborating  
17 testimony from Plaintiff, his mother, and his sister-in-law support Plaintiff's argument that his  
18 symptoms were helped, but not alleviated, by treatment. (Tr. 90, 111-13, 118, 146, 175, 121-22,  
19 138-39, 420-52, 453-54, 464, 466-67, 473, 817, 953-56). The record also shows that the  
20 Plaintiff only did activities intermittently and he quit driving because he tired easily, lacked  
21 coordination and focus, and was averse to being around people. (Tr. 96-97, 125-36, 455, 1056,  
22 150, 451-52, 457-58, 1046-47, 1049, 1052-54, 1056-58). Moreover, Plaintiff need not be  
23 "utterly incapacitated" in order to be disabled. *Moore v. Comm'r of Social Sec. Admin.*, 278  
24 F.3d 920, 925 n.2 (9th Cir. 2002).

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1 Finally, the ALJ concluded that Plaintiff is not as socially isolated as he claims. However,  
2 Plaintiff's claim that he is very socially isolated is supported by the record, which demonstrates  
3 that he has one friend, does not like people, and has little-to-no social contact with friends or  
4 family. (Tr. 66-69, 97, 123-26, 147-49, 461, 607, 928, 1058). Plaintiff's isolation is not negated  
5 by his attempt to attend one car show (Tr. 453), his audition for one band (Tr. 865), nor by his  
6 daily car-pooling to the methadone clinic with his only friend during the nearly five-year relevant  
7 period. The ALJ also stated multiple times in his opinion that Plaintiff played in a band, which  
8 the record does not reflect for the relevant period. (Tr. 509, 510, 461). Accordingly, I conclude  
9 that the ALJ's determination regarding Plaintiff's credibility was erroneous as it was not  
10 supported by substantial evidence.

11 B. Lay Witness Evidence

12 Plaintiff claims that the ALJ did not provide adequate reasons for rejecting statements  
13 from his mother and sister-in-law. The Commissioner argues that the ALJ properly considered  
14 lay testimony from both individuals.

15 Descriptions from friends and relatives in a position to observe a claimant's symptoms  
16 and daily activities are routinely treated as competent evidence of a claimant's condition. *E.g.*,  
17 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). An ALJ may discount descriptions  
18 from these persons by stating reasons germane to each witness. *Dodrill*, 12 F.3d at 919.

19 Rather than rejecting the lay-testimony in this case, the ALJ found that it did not indicate  
20 that Plaintiff is unable to perform light or sedentary work. (Tr. 510). Plaintiff's mother and  
21 sister-in-law described Plaintiff's impairments, symptoms, and activities in written statements and  
22 questionnaires. They also described Plaintiff building model cars and planes, reading, cooking,  
23 and doing chores, as well as his social isolation, poor grooming, edema, and asthma problems.  
24 (Tr. 98-103, 145-50, 175). The ALJ found these statements generally credible. (Tr. 510).



1 Therefore, I conclude that the ALJ did not err in evaluating lay witness testimony.

2 C. Severity of Impairments

3 Plaintiff claims the ALJ erred in not finding that his restless leg syndrome, periodic limb  
4 movement during sleep, anxiety, and possible sleep apnea are severe impairments.<sup>1</sup> The  
5 Commissioner argues that the record is conflicted as to the extent of Plaintiff's sleep apnea and  
6 restless leg syndrome, and that despite finding Plaintiff's anxiety non-severe, the ALJ accounted  
7 for it by limiting Plaintiff to work not requiring public interaction. (Tr. 510, 512, Finding no. 5).

8 An impairment is severe if it creates more than a "minimal effect" on a claimant's ability  
9 to do basic work activities. SSR 96-3p; *Edlund*, 253 F.3d 1152, 1158 (9th 2001). At step two,  
10 Plaintiff must meet a de minimis screening requirement by making a threshold showing that his  
11 medically determinable impairments significantly limit his ability to perform basic work activities.  
12 *See Bowen v. Yuckert*, 482 U.S. 137, 145, 107 S.Ct. 2287 (1987).

13 Plaintiff has not made a threshold showing that restless leg syndrome, periodic limb  
14 movement during sleep, anxiety, and possible sleep apnea significantly limit his ability to perform  
15 basic work activities. According to recitations of Plaintiff's medical history by Dr. Ahmad<sup>2</sup>,  
16 Plaintiff's primary physician from 2000 to 2003, Plaintiff has a history of these conditions. (Tr.  
17 788-95, 803-16, 974). Nurse Parkman recommended further evaluation of Plaintiff's limb  
18 movements and possible apnea. (Tr. 371). However, the record does not correlate Plaintiff's  
19 chronic fatigue with his alleged sleep-disturbing conditions as strongly as Plaintiff argues. (Tr.

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21 <sup>1</sup> The Court does not address Plaintiff's claim that the ALJ erroneously failed to find  
22 Plaintiff's edema severe because the record reflects that the ALJ did find Plaintiff's edema to be a  
23 severe impairment. (Tr. 506, 512, Finding no. 2).

24 <sup>2</sup> In its Order dated September 16, 2004, this Court instructed the ALJ to contact Dr.  
25 Ahmad on remand for clarification of the doctor's opinion (Tr. 514). However, the ALJ was  
26 unable to comply because Dr. Ahmad is apparently in prison for Medicaid fraud. (Tr. 508).



1 66-69, 104-108, 16-18, 129, 135, 451, 457, 470, 590, 604, 630, 1053, 1057). The record  
2 instead implies that Plaintiff's fatigue is linked to his liver problems (Tr. 624, 628) and  
3 prescription drug side effects (Tr. 949, 981). Plaintiff's treatment providers have not yet  
4 concluded that he has sleep apnea, and the portions of the record cited by Plaintiff do not discuss  
5 his alleged anxiety. The ALJ's conclusion that these impairments are not severe was therefore  
6 supported by substantial evidence and was not in error.

7 D. Medical Evidence

8 Plaintiff claims the ALJ improperly rejected medical evidence pertaining to Plaintiff's  
9 impairments and the functional limitations they caused. (Tr. 506). Plaintiff argues that the ALJ  
10 erred in rejecting the opinions of treating neurologist Dr. Holmes; treating physician Dr. Byrne;  
11 treating neuropsychologist Dr. Drane; examining DDS consultants; consulting psychologists Dr.  
12 Gustavson and Dr. Johnston; treating counselors from Community Psychiatric Clinic; medical  
13 consultants Dr. Eisenhauer, Ph.D., and Dr. Peterson; and consulting therapist Ms. Collins. The  
14 Commissioner responds that the ALJ properly evaluated these opinions in carrying out his  
15 responsibility to determine credibility and resolve ambiguities and conflicts in the medical  
16 evidence. *Batson v. Comm'r of Social Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).

17 A claimant's treating physicians's opinions are afforded the most weight, and if  
18 uncontradicted, may only be rejected for clear and convincing reasons supported by substantial  
19 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). The ALJ may satisfy this  
20 burden by summarizing conflicting evidence, interpreting it, and making findings. *Morgan*, 169  
21 F.3d 595, 600 (9th Cir. 1999); *see also Magallanes*, 881 F.2d at 750. An ALJ may reject  
22 treating physicians' opinions that are unsupported by objective medical findings or the record as  
23 a whole, *Batson*, 359 F.3d at 1195, or premised on a claimant's discredited subjective  
24 complaints. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).



1 Here, The ALJ stated clear and convincing reasons supported by substantial evidence for  
2 rejecting several of Plaintiff's treating and examining physicians' opinions. In addition, the ALJ  
3 cited other opinions and evidence that supported his conclusion that Plaintiff was not precluded  
4 from light and sedentary work, as detailed below.

5 1. Physical Impairments

6 Plaintiff argues the ALJ erred in rejecting the opinions of Dr. Holmes and Dr. Byrne and  
7 for rejecting a DDS assessment. The Commissioner argues that the ALJ stated clear and  
8 convincing reasons for rejecting the opinions of Dr. Holmes and Dr. Byrne, and need not have  
9 addressed the environmental limitations opined by these doctors and by the DDS assessment.

10 The record supports the Commissioner's arguments. Dr. Holmes has treated Plaintiff for  
11 epilepsy since 2003. (Tr. 986). In a questionnaire, Dr. Holmes indicated that Plaintiff should  
12 avoid unprotected heights and moving machinery, and that he should not drive. (Tr. 988-90).  
13 Dr. Holmes further indicated that Plaintiff should not be exposed to marked temperature changes  
14 or humidity, dusts, fumes, gases, or stress, or Plaintiff's seizure disorder might be affected. (Tr.  
15 988-90). The ALJ rejected some of Dr. Holmes' findings because they were repeatedly stated in  
16 terms of what the Plaintiff had reported. (Tr. 509). For example, Dr. Holmes stated that  
17 *Plaintiff reported* he could not use his hands for repetitive activities because his coordination  
18 was off. (Tr. 509, 989). The ALJ also found that limitation inconsistent with Plaintiff's ability to  
19 make models and play the guitar. (Tr. 509). The ALJ rejected Dr. Holmes' finding that Plaintiff  
20 could not lift "anything" because it lacked basis and contradicted Dr. Byrne's statement that  
21 Plaintiff could lift up to 25 pounds. *Id.*

22 In March of 2005, Dr. Byrne indicated that chronic edema prevented Plaintiff from using  
23 his hands for fine manipulation (Tr. 983). The ALJ rejected this opinion based on Plaintiff's  
24 ability to play guitar and build models. (Tr. 508-09). Dr. Byrne also opined that Plaintiff could



1 sit up to 24 hours continuously but for only four hours during an eight-hour work day (Tr. 982),  
2 which the ALJ rationally concluded was inconsistent (Tr. 508). Moreover, the ALJ pointed out  
3 that Dr. Byrne's findings that Plaintiff could sit up to four hours, stand up to four hours, and  
4 walk up to two hours in an eight-hour work day did not suggest that Plaintiff was precluded  
5 from working an eight-hour day. *Id.*

6 The ALJ stated clear and convincing reasons for rejecting Dr. Holmes' findings as to  
7 Plaintiff's coordination and lifting ability, and for rejecting Dr. Byrne's findings as to Plaintiff's  
8 abilities to sustain fine manipulation and to sit, stand, and walk during a work day. The ALJ did  
9 not need to address the environmental limitations opined by Dr. Holmes, and supported by  
10 findings from Dr. Byrne (Tr. 984) and a DDS assessment<sup>3</sup> because environmental limitations do  
11 not preclude Plaintiff from performing a wide range of light or sedentary work. SSR 85-15.

## 12 2. Mental Impairments

13 Plaintiff claims the ALJ failed to provide valid reasons for rejecting the opinions of  
14 Plaintiff's mental health care providers. Plaintiff argues that these care providers' opinions  
15 support a finding that Plaintiff met or equaled mental health listings 12.04 and 12.06, found in 20  
16 C.F.R. pt. 404, Subpt. P, App.1. Plaintiff specifically argues that the ALJ improperly rejected  
17 the Global Assessment of Functioning ("GAF") scores assigned by Dr. Gustavson, Dr. Johnston,  
18 and treatment providers at the Community Psychiatric Clinic (CPC), and improperly rejected  
19 opinions on Plaintiff's functional limitations from Dr. Drane, Dr. Byrne, Ms. Collins, Dr.  
20 Eisenhower, and Dr. Peterson. The Commissioner responds that the ALJ properly evaluated  
21 medical opinions and cited substantial evidence supporting his conclusion.

22 The ALJ concluded that Plaintiff's depression precluded frequent public interaction but

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23  
24 <sup>3</sup> Despite the findings of Plaintiff's environmental limitations, DDS medical consultants  
25 also concluded that Plaintiff was able to perform sedentary work activity. (Tr. 334-39, 838-41).



1 not all unskilled work. (Tr. 510). In evaluating the medical evidence and opinions, the ALJ  
2 weighed conflicting medical opinions to reach his conclusion, which is supported by substantial  
3 evidence in the record. (Tr. 495-510).

4       Regarding Plaintiff's GAF scores, the ALJ did not and need not have addressed them  
5 separately from the treatment providers who assigned because GAF scores are not directly  
6 correlated with disability listings. *See* 65 Fed. Reg. 50764–50765 (Aug. 21, 2000); *Vincent ex*  
7 *rel. v. Heckler*, 739 F.2d 1393, 1934-95 (9th Cir. 1984). In addition, the findings of doctors  
8 who assigned Plaintiff GAF scores do not demonstrate Plaintiff's mental impairments as clearly  
9 he argues. The record supports the Commissioner's interpretation of evidentiary conflict. For  
10 example, Dr. Gustavson diagnosed Plaintiff with adjustment disorder and assigned him a GAF of  
11 45 to 50, but the doctor also found that Plaintiff was coherent; his memory, attention, and  
12 concentration tested well; and that his complaints were primarily physical, not mental. (Tr. 216).  
13 Likewise, Dr. Johnston found Plaintiff anxious and depressed, but also found that Plaintiff's  
14 ability to persist in difficult situations and sustain concentration depends on his level of interest in  
15 the situation. (Tr. 747). Similarly, Dr. Drane opined that Plaintiff had mild neurocognitive  
16 dysfunction, significant depression, social anxiety, strong somatizational tendencies, and ongoing  
17 psychiatric issues that would hinder his functioning in all life areas. (Tr. 885-86). However, Dr.  
18 Drane did not say that Plaintiff was precluded from working and indicated that Plaintiff could  
19 manage his own finances and self-care and the cognitive demands of most jobs. *Id.*

20       The record also shows that the opinions of Community Treatment Providers (CTP) and  
21 Plaintiff's therapist Ms. Collins conflicted with the opinions of Dr. Johnston, Dr. Eisenhower, and  
22 Dr. Peterson. Plaintiff's treatment team from CPT gave a dismal assessment of Plaintiff's  
23 abilities, indicating that he has marked difficulties with daily living, social functioning, performing  
24 tasks, and concentrating. (Tr. 422-25, 737-43, 976-79). Ms. Collins similarly indicated that



1 Plaintiff has marked restriction in activities of daily living; extreme difficulties in social  
2 functioning; extreme deficiencies in persistence, pace, and concentration; and that his  
3 impairments were not conducive to work. (Tr. 1023-25). However, the ALJ rejected Ms.  
4 Collins' opinion because it was based on Plaintiff's physical limitations which Ms. Collins was  
5 not qualified to assess, and because the ALJ did not find her to be an acceptable medical source.  
6 (Tr. 509); *see* 20 C.F.R. § 404.1513.

7 In contrast to the assessments offered by CTP and Ms. Collins, medical consultant Dr.  
8 Eisenhower, Ph.D., indicated that Plaintiff was "moderately" limited in some facets of sustained  
9 concentration and persistence, social interaction, and adaptation (Tr. 315-17), and Dr. Peterson  
10 found Plaintiff to be only "moderately" limited in social interaction (Tr. 751). Dr. Eisenhower  
11 found Plaintiff cognitively intact, but indicated that Plaintiff should not work closely with the  
12 public due to depression and social restrictions. (Tr. 315-17). Dr. Peterson reiterated the  
13 conclusion that Plaintiff would work best with minimal public or supervisory contact. (Tr. 751).  
14 Neither doctor found Plaintiff "markedly" limited in any area. (Tr. 315-17, 748-51). The ALJ  
15 also found that Plaintiff's activities and reports of improvement on medications demonstrate that  
16 he could perform light, unskilled work. (Tr. 510, 746, 711, 857, 848, 999).

17 The medical opinions interpreted and relied upon by the ALJ comprise substantial  
18 evidence in support of his conclusion that despite Plaintiff's limitations, his mental impairments  
19 do not preclude him from working. Therefore, I conclude that the ALJ properly evaluated the  
20 medical opinion evidence.

21 E. Use of the Guidelines

22 Plaintiff argues that the ALJ omitted significant non-exertional and exertional limitations  
23 from his RFC finding and should not have relied on the grids to find Plaintiff not disabled. 20  
24 C.F.R. pt. 404, Subpt. P, App. 2. The Commissioner responds that the ALJ properly relied on



1 the grids because they accounted for Plaintiff's only non-exertional limitation of no frequent  
2 interaction with the public.

3 The ALJ bears the burden at step five to show there are jobs in significant numbers  
4 existing in the national economy that Plaintiff can perform given his RFC. 20 C.F.R. §  
5 416.960(c)(2). The ALJ can meet this burden by using testimony of a VE or by reference to the  
6 grids. The grids can only be used for exertional limitations, *Holohan v. Massanari*, 246 F.3d  
7 1195, 1208-09 (9th Cir. 2001), and must completely and accurately represent a claimant's  
8 limitations. *E.g., Tackett*, 180 F.3d at 1101. When a claimant has non-exertional impairments  
9 severe enough to limit his functional capacity in ways not contemplated by the grids, the ALJ  
10 may not rely on the grids, but must consult a VE. *E.g., Osenbrock v. Apfel*, 240 F.3d 1157,  
11 1162-63; *Moore v. Apfel*, 216 F.3d 864, 869 (9th Cir. 2000); *Tackett*, 180 F.3d at 1101-02.

12 In this case, the ALJ posed two hypothetical claimant scenarios for the VE to assess. In  
13 the first, the ALJ asked the VE to take into account all of the impairments Plaintiff had testified  
14 to, assuming that Plaintiff's testimony was credible. Based on Plaintiff's limitations, including his  
15 testimony that he was unable to perform any work longer than 20-30 minutes without needing to  
16 rest (Tr. 1052-53), the VE concluded that Plaintiff could not sustain work at any job for an  
17 eight-hour work day (Tr. 1068). In the second hypothetical, the ALJ asked the VE to assume  
18 that Plaintiff's need for rest every 20-30 minutes was accommodated or did not exist. (Tr.  
19 1069). Working under this assumption, the VE concluded that Plaintiff could perform several  
20 light jobs, such as furniture finishing or production assembly. (Tr. 1070).

21 The ALJ ultimately relied only on the grids. The ALJ reasoned that he need not rely on  
22 the VE because the VE's conclusions were based on the Plaintiff being credible. (Tr. 511).  
23 However, as discussed *supra* at subsection A, the ALJ's finding that Plaintiff was not credible  
24 was in error as it was not supported by substantial evidence. The ALJ did not address why



1 Plaintiff's testimony that his poor stamina allowed him only to work in 20-30 minute increments  
2 was not credible, and the ALJ's credibility-based dismissal of Plaintiff's other non-exertional  
3 limitations (e.g., inability to perform fine manipulation, environmental restrictions due to asthma  
4 and epilepsy) was inadequate for the reasons discussed in subsection A. Because the ALJ found  
5 Plaintiff to be not credible, the ALJ did not incorporate Plaintiff's inability to work longer than  
6 20-30 minutes into his RFC. This led the ALJ to erroneously rely on the grids, which also did  
7 not take into account Plaintiff's inability to work longer than 20-30 minutes.

8 Plaintiff's testimony regarding his need for rest every 20-30 minutes should be credited as  
9 true because there is no evidence contradicting this testimony and the ALJ's credibility finding  
10 was erroneous. *See Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004); *Connett v.*  
11 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003); *Bunnell v. Barnhart*, 336 F.3d 1112, 1116 (9th  
12 Cir. 2003). It is clear from the record that if Plaintiff's testimony is credited, a finding of  
13 disability at step five is required, *Smolen*, 80 F.3d at 1292, and further proceedings would not  
14 serve a useful purpose, *Harman v. Apfel*, 211 F.3d 1172, 1177-78 (9th Cir. 2000).

#### 15 VIII. CONCLUSION

16 The Commissioner's determination to deny Plaintiff benefits is not free of legal error and  
17 is not supported by substantial evidence. Based on the record evidence, the undersigned  
18 recommends that the Commissioner's decision be REVERSED and REMANDED for payment  
19 of benefits.

20 DATED this 10<sup>th</sup> day of July, 2006.

21 

22 MONICA J. BENTON  
23 United States Magistrate Judge  
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